Low Thiam Teck v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–118–05 OF 2013
BALIA YUSOF, AZIAH ALI AND TENGKU MAIMUN JJCA
15 SEPTEMBER 2014

Evidence — Inference — Conduct of accused — Whether conduct of accused when arrested created inference he had knowledge of drugs — Whether reasonable for accused to have looked 'surprised' when arresting officer approached him with drawn gun — Whether accused's failure to attempt to run away, put up a struggle or do any overt act rendered trial court's finding he had knowledge of drugs insupportable — Whether mere physical proximity to drugs insufficient to prove possession — Whether trial judge erred in failing to consider element of common intention — Whether evidence did not support inference of common intention — Whether defence's case not inherently improbable and raised reasonable doubt on prosecution's case — Whether trial judge erred in failing to give reason for rejecting defence case

The appellant ('Low') was sentenced to death by the High Court after he was found guilty of trafficking in 9,876.2g of heroin at a basement car park of a hotel. The charge against Low, under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'), alleged that he had common intention to commit the offence together with two others pursuant to s 34 of the Penal Code. According to the prosecution's evidence, two teams of police officers had separately tailed two cars, one driven by Low (whose passenger at the time was Tin) and the other, driven by a person named Lum. At one point, the cars pulled up near each other and police noticed Lum taking out three bags from his car and putting them on the rear seat of the car driven by Low before the two cars drove off. The police continued to follow the two cars. When Lum finally stopped at a house, he was arrested and taken to the police station. Nothing incriminating was found in a search of his person or of the house. The other police party followed Low's car to the basement car park of a hotel where Low and Tin were arrested after they alighted from the vehicle. The police party allegedly found one bag placed on the handbrake of the car between the two front seats and two bags on the rear seat. All the bags allegedly contained heroin. The inspector who led the police party which arrested Low testified that he did draw his firearm at the time he arrested Low and Tin and that the duo appeared to be 'surprised' by the ambush. Low, Tin and Lum were initially jointly charged with the offence but were acquitted and discharged at the end of the prosecution's case when the trial judge ruled there was doubt over the total weight of the heroin involved. The prosecution's appeal against the acquittal of Tin and Lum was struck out by the Court of Appeal ('the CA') because they

A could not be located. The appeal against Low's acquittal was allowed and he was ordered to enter his defence. Low's defence was that Tin was his employer and he was merely driving the car on Tin's instruction; that he did not know Lum nor what was in the bags; that no bag was placed in between the two front seats of the car at the material time and that he was surprised when a person B identifying himself as a policeman accosted him with a drawn pistol when he was standing at the lift area of the hotel after alighting from the car. The trial court dismissed Low's defence as a bare denial, concluded that he had knowledge, custody and control of the heroin at the material time and invoked the presumption of trafficking against him under s 37(da) of the DDA. In the C instant appeal against conviction and sentence, Low argued that the trial judge had no basis to conclude he had knowledge of the drugs and that there was nothing in the judgment to show the trial judge had considered whether the element of 'common intention' had been proven.

D **Held,** allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the appellant:

(1) The prosecution failed to establish any evidence upon which an inference of knowledge about the drugs in the car could be made. Without E knowledge, the prosecution failed to establish the ingredient of possession. Low's look of surprise when he was arrested was a reasonable reaction as SP5 admitted he had his firearm drawn at the time. Low and Tin did not resist arrest and there was no evidence of any overt act on their part. There was no evidence they were afraid or that they attempted F to escape or put up a struggle against the police. There was also insufficient evidence to show Low had possession of the heroin together with the two others or with either one of them (see paras 22–23).

(2) Physical proximity to the drugs per se was insufficient to prove possession without proof of knowledge. Except for the evidence of proximity, there G was nothing in Low's or Tin's conduct at the time of their arrest upon which a prima facie inference could be made that Low had knowledge of the drugs. In the circumstances, there was no possession. The trial judge's basis for inferring knowledge based on Low's conduct was insupportable (see paras 24–25).

H

(3) On the evidence, the prosecution failed to prove the element of common intention. Nowhere in the judgment did the trial judge address that issue. This was a serious non-direction amounting to misdirection. There was insufficient evidence to show any pre-planning between Low, Tin and I Lum and there was no evidence to link Low to Lum (see paras 26 & 28).

(4) The defence's case was not inherently improbable and it raised a reasonable doubt on the prosecution's case on balance of probabilities thereby rebutting the presumption under s 37(da) of the DDA. The trial judge not only failed to give reasons for rejecting the defence's case but

also failed to direct his mind to the issue of common intention. This was a serious misdirection by way of non-direction. It was unsafe to maintain the conviction (see paras 30–31).

[Bahasa Malaysia summary

Perayu ('Low') dijatuhkan hukuman mati oleh Mahkamah Tinggi selepas dia didapati bersalah mengedar heroin sebanyak 9,876.2g di tempat letak kereta tingkat bawah tanah hotel. Tuduhan terhadap Low, di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'), mendakwa bahawa dia mempunyai niat bersama untuk melakukan kesalahan bersama dengan dua orang yang lain berikutan s 34 Kanun Keseksaan. Mengikut keterangan pihak pendakwaan, dua kumpulan pegawai polis telah secara berasingan mengekori dua kereta, satu dipandu oleh Low (penumpang pada masa tersebut adalah Tin) dan yang satu lagi, dipandu oleh seorang yang bernama Lum. Pada satu masa, kereta-kereta berhenti sebelah menyebelah dan polis memerhati yang Lum mengeluarkan tiga beg daripada keretanya dan meletakkan ia di belakang kereta yang dipandu oleh Low sebelum kedua-dua kereta berundur dari situ. Polis terus mengekori kedua-dua kereta tersebut. Apabila Lum akhirnya berhenti di sebuah rumah, dia ditangkap dan dibawa ke stesyen polis. Tiada bahan bersalah diperolehi dalam carian ke atasnya atau rumah tersebut. Pasukan polis satu lagi mengekori kereta Low ke tingkat bawah tanah hotel di mana Low dan Tin ditangkap selepas mereka keluar daripada kenderaan tersebut. Pasukan polis tersebut mendapati satu beg yang diletakkan di atas brek tangan kereta di antara dua kerusi hadapan dan dua beg di kerusi belakang. Kesemua beg didakwa mengandungi heroin. Inspektor yang membawa pasukan polis yang menangkap Low memberi keterangan bahawa dia mengeluarkan pistolnya pada masa dia menangkap Low dan Tin dan bahawa kedua-dua mereka nampak seperti 'surprised' dengan serbuan tersebut. Low, Tin dan Lum pada mulanya dituduh bersama dengan kesalahan tetapi dibebaskan dan dilepaskan pada akhir kes pendakwaan apabila hakim perbicaraan memutuskan terdapat keraguan terhadap berat heroin yang terlibat. Rayuan pihak pendakwaan terhadap pembebasan Tin dan Lum dibatalkan oleh Mahkamah Rayuan ('MR') kerana mereka tidak dapat dihubungi. Rayuan terhadap pembebasan Low dibenarkan dan dia diperintahkan untuk memasukkan pembelaannya. Pembelaan Low adalah bahawa Tin adalah majikannya dan dia hanya memandu kereta tersebut atas arahan Tin; bahawa dia tidak mengenali Lum ataupun apa yang terdapat dalam beg tersebut; bahawa tidak ada beg yang diletakkan di antara dua kerusi hadapan kereta pada masa material dan bahawa dia terkejut apabila orang memperkenalkan dirinya sebagai polis menghampirinya dengan pistol apabila dia berdiri di kawasan lif hotel selepas keluar daripada kereta tersebut. Mahkamah perbicaraan menolak pembelaan Low sebagai penafian kosong, memutuskan yang dia mempunyai pengetahuan, jagaan dan kawalan terhadap heroin pada masa material dan membangkitkan anggapan pengedaran terhadapnya di bawah s 37(da) ADB. Dalam rayuan ini terhadap sabitan dan

A hukuman, Low berhujah bahawa hakim perbicaraan tidak mempunyai asas untuk memutuskan dia mempunyai pengetahuan mengenai dadah tersebut dan bahawa tidak terdapat apa-apa dalam penghakiman untuk menunjukkan hakim perbicaraan telah mempertimbangkan sama ada unsur 'common intention' telah dibuktikan.

B

Diputuskan, membenarkan rayuan, mengetepikan sabitan dan hukuman dan membebaskan dan melepaskan perayu:

(1) Pihak pendakwaan gagal untuk membuktikan apa-apa keterangan yang mana inferens pengetahuan mengenai dadah dalam kereta boleh dibuat. Tanpa pengetahuan, pihak pendakwaan gagal untuk membuktikan unsur milikan. Rupa terkejut Low apabila dia ditangkap adalah reaksi yang munasabah kerana seperti yang diakui SP5 dia telah mengeluarkan senjata apinya pada masa tersebut. Low dan Tin tidak menentang penangkapan dan tidak terdapat keterangan mengenai apa-apa perbuatan terbuka oleh pihak mereka. Tidak terdapat keterangan yang mereka takut atau mereka cuba melarikan diri atau bergelut dengan polis. Juga terdapat keterangan yang tidak mencukupi untuk menunjukkan Low mempunyai milikan terhadap heroin bersama dengan dua yang lain atau dengan salah seorang daripada mereka (lihat perenggan 22–23).

(2) Kehampiran fizikal kepada dadah tersebut itu sendiri adalah tidak mencukupi untuk membuktikan milikan tanpa bukti terhadap pengetahuan. Kecuali keterangan kehampiran, tidak terdapat apa-apa dalam tingkah laku Low atau Tin pada masa tangkapan mereka di mana inferens prima facie boleh dibuat bahawa Low mempunyai pengetahuan terhadap dadah tersebut. Dalam keadaan ini, tidak terdapat milikan. Asas hakim perbicaraan untuk merujuk pengetahuan berdasarkan tingkah laku Low tidak dapat disokong (lihat perenggan 24–25).

(3) Atas keterangan, pihak pendakwaan gagal untuk membuktikan unsur niat bersama. Tiada di mana-mana dalam penghakiman hakim perbicaraan menjawab isu tersebut. Ini adalah bukan arahan serius menjumlahkan kepada salah arahan. Tidak terdapat keterangan yang mencukupi untuk menunjukkan apa-apa pra perancangan antara Low, Tin dan Lum dan tiada keterangan untuk mengaitkan Low kepada Lum (lihat perenggan 26 & 28).

(4) Kes pembelaan secara inherens sukar diterima akal dan ia membangkitkan keraguan munasabah atas kes pendakwaan atas imbangan kebarangkalian dengan itu mematahkan anggapan di bawah s 37(da) ADB. Hakim perbicaraan bukan sahaja gagal untuk memberi alasan bagi menolak kes pembelaan tetapi juga gagal untuk mengarahkan mindanya kepada isu niat bersama. Ini adalah salah arahan serius melalui bukan arahan. Maka, ia adalah tidak selamat untuk mengekalkan sabitan tersebut (lihat perenggan 30–31).]

Notes

For cases on conduct of accused, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2165.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1; [1993] 4 CLJ 1, SC (refd)
Ganapathy a/l Rengasamy v PP [1998] 2 MLJ 577; [1998] 2 CLJ 1, FC (refd)
Khoo Hi Chiang v PP And Another Appeal [1994] 1 MLJ 265; [1994] 2 CLJ 151, SC (refd)
Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Mahbub Shah v King Emperor [1945] LR 72 lA 148, PC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (not folld)
PP v Basri bin Salihin [1994] 2 MLJ 476; [1993] 1 CLJ 420, HC (refd)
PP v Mohd Bandar Shah bin Nordin & Anor [2008] 4 MLJ 556; [2008] 4 CLJ 859, CA (refd)
PP v Salleh bin Zakaria & Anor [2010] 4 MLJ 25; [2010] 4 CLJ 671, CA (refd)
Romi Amora bin Amir v PP [2011] 4 MLJ 571; [2011] 1 CLJ 870, CA (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37; [2005] 1 CLJ 466; [2004] 1 LNS 654, CA (refd)
Wan Yurillhami bin Wan Yaacob & Anor v PP [2010] 1 MLJ 749; [2010] 1 CLJ 17; [2009] 1 LNS 1125, FC (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(da), 39B(1)(a)
Penal Code s 34

Appeal from: Criminal Trial No 45–29 of 2007 (High Court, Kuala Lumpur)

Afifuddin Ahmad Hafifi (Salehuddin Saidin & Assoc) for the appellant.
Tetralina bt Ahmed Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Aziah Ali JCA (delivering judgment of the court):

[1] The appellant was charged jointly with two others, namely Tin Kee Cheong ('the second accused') and Lum Mun Seng ('the third accused'), with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read with s 34 of the Penal Code, of trafficking in 9,876.2g of heroin on 14 May 2007 at about 8.10pm at basement car park level P4, Mandarin Oriental Hotel, Kuala Lumpur (exh P3).

[2] At the end of the prosecution case the learned trial judge found that the prosecution had failed to establish a prima facie case against all the three accused persons on the sole issue that the chemist, 'SP10' Nurshidawati bt Othman who had, on the instructions of 'SP8' Abdul Rahim bin Shadan, carried out the Gas Chromatography Flame Ionization Detector ('GCFID') test to determine the quantity of heroin in the drugs recovered, had failed to state in her testimony what was the nett weight of the drugs that she had analysed. According to the learned trial judge, it was necessary for SP10 to confirm in her testimony the nett weight of the heroin as stated in the chemist report exh P29 prepared by SP8. Without this testimony, His Lordship found that the actual weight of the heroin could not be confirmed and this raised a doubt as to whether the nett weight of the heroin as stated in exh P29 was the weight obtained by SP10 from her analysis. Consequently His Lordship acquitted and discharged the three accused persons without calling for their defence.

[3] The prosecution appealed to the Court of Appeal. At the hearing of the appeal only the appellant ('the first accused') was present. The prosecution failed to locate the second and third accused persons. The Court of Appeal struck out the appeal against the acquittal and discharge of the second and third accused persons. The appeal against the acquittal and discharge of the appellant was allowed and the appellant was ordered to enter his defence.

[4] At the end of the defence case, the learned trial judge found that the appellant had failed to raise a reasonable doubt in the prosecution case and had failed to rebut the presumption of trafficking under s 37(da) of the Act. Accordingly the learned judge found the appellant guilty of the offence as charged. The appellant was consequently convicted and sentenced to death. Hence this appeal. At the conclusion of the appeal, we found that it was not safe to maintain the conviction. Therefore we set aside the conviction and sentence and we acquitted and discharged the appellant. We now give our reasons below.

PROSECUTION CASE

[5] For the purpose of this judgment, we reproduce the relevant background facts adduced by the prosecution. Briefly the evidence adduced by the prosecution was that on 14 May 2007 two teams of police personnel, one led by 'SP2' C/Insp Basri Hussin and the other led by 'SP5' Insp Mohd Zuhairi bin Mohd Zubir, acting on information received, had conducted surveillance at two locations ie at Taman Connaught, Cheras and at the Mandarin Oriental Hotel, Kuala Lumpur. The team led by SP2 included 'SP3' D/L/Kpl Mohd Iskandar bin Mohd Shah and 'SP4' D/L/Kpl Mohd Faizal bin Ibrahim. They kept surveillance at Taman Connaught. The team led by SP5 kept surveillance at the Mandarin Oriental Hotel.

[6] At about 7.05pm SP2 saw a Naza Ria car bearing registration No WLJ 3088 drove by and he tailed the car. This car then stopped by the road side. SP2 said the distance between him and the Naza Ria car was about 20 meters. SP2 saw the driver made a phone call. Approximately ten minutes later, SP2 saw a green coloured Citroen car bearing registration number MAG 343 with two males inside stopping next to the Naza Ria car. SP2 could not identify the two occupants of the Citroen car because according to him it was dark since it was already 7.30pm. SP2 said that the two occupants of the Citroen car did not alight from the car. Then SP2 saw the driver of the Naza Ria car took out from the car three bags green, black and chocolate in colour and placed the bags on the right rear passenger seat of the Citroen car. Both cars then drove off. SP2 instructed his men to follow the Naza Ria car on their motorcycles while SP4 tailed the Citroen car to the Mandarin Oriental Hotel.

[7] The Naza Ria car stopped at house No 2A, Jalan Damai Impian 2/6, Taman Impian 2, Kuala Lumpur. SP2 and SP3 arrested the driver, identified as the third accused. Nothing incriminating was found on the third accused or in the house. After the arrest the third accused was taken to the Dang Wangi Police Station.

[8] Meanwhile at about 8pm, SP5 received information from SP4 that the Citroen car was heading towards the basement car park at the Mandarin Oriental Hotel. This car then passed by SP5 who then followed the said car to level P4 of the hotel car park. When the said car stopped, SP5 approached the driver of the car (identified as the appellant) while D/Sjn Halim approached the passenger of the car (identified as the second accused). SP5 identified himself and ordered both the appellant and the passenger to come out of the car. According to SP5 both the appellant and the second accused looked surprised. SP5 instructed a member of his team, D/Kpl Ramli to handcuff the second accused and D/Sjn Halim to handcuff the appellant. SP5 carried out a physical check on the persons of the appellant and the second accused but did not find anything incriminating on them. SP5 then inspected the car.

[9] According to SP5 he found one green coloured bag (exh P16) placed on the hand brake of the car in between the two front seats. This bag P16 contained six packets wrapped in newspapers. On opening one of the packets, SP5 found two packets wrapped in transparent plastic which contained white powder suspected to be dangerous drugs. Similar contents were found in the remaining five packets (identified and marked as exhs P16A2, P16A3, P16A5, P16A6, P16A8, P16A9, P16A11, P16A12, P16A14, P16A15, P16A17, P16A18). From the rear passenger seat SP5 recovered one grey coloured bag (exh P17) and one chocolate coloured bag (exh P18).

[10] The bag exh P17 contained six packets wrapped in newspapers. Each packet contained two packets of transparent plastic with white powder suspected to be dangerous drugs inside (exhs P17B2, P17B3, P17B5, P17B6, P17B8, P17B9, P17B11, P17B12, P17B14, P17B15, P17B17, P17B18). The bag exh P18 contained five plastic packets wrapped in newspapers with each packet containing two plastic packets of white powder (exhs P18C2, P18C3, P18C5, P18C6, P18C8, P18C9, P18C11, P18C12, P18C14, P18C15). No further incriminating items were recovered from the car. SP5 then brought the appellant, the second accused and the exhibits recovered to the Dang Wangi Police Station. There, SP5 marked the exhibits recovered and prepared two separate search lists (exhs P11 and P12). SP5 also lodged a police report. The drugs were then sent to the Chemistry Department for analysis.

[11] The chemist SP8 testified that he was assisted by 'SP9' Hazliza bt Haron and SP10. SP8 gave samples of the drugs to both SP9 and SP10. He directed SP9 to determine whether or not the samples contained heroin using the Gas Chromatography Mass Spectrocopy ('GCMS') instrument and he directed SP10 to determine the weight of the heroin through quantitative analysis using the GCFID instrument. The test conducted by SP9 confirmed the presence of heroin. Both SP9 and SP10 testified that they had reported the results of their analysis to SP8 who then prepared the report exh P29.

DEFENCE CASE

[12] The appellant was the sole witness for the defence. According to the appellant, the second accused was his employer. On the day of the incident, the second accused had asked the appellant to drive the second accused because the second accused had wanted to meet a Thai woman named 'Ah Kim'. The appellant drove his Citroen car to Cheras to fetch the second accused. The second accused entered the car and asked the appellant to drive to Taman Connaught to meet the second accused's friend. The appellant did not ask who this friend was because according to him, he was merely asked to drive. He did not know this person. At Taman Connaught, the second accused got out of the car to speak to his friend while the appellant remained in the car. Then the second accused opened the rear passenger door and his friend placed bags inside the car. The appellant said that he did not know how many bags. The second accused then entered the car. The appellant said that he had asked the second accused what were in the bags and the second accused told him that the bags contained clothes as gifts for the Thai woman. The second accused then asked the appellant to drive to the hotel next to the Kuala Lumpur Convention Centre where he was to meet the Thai woman. At the hotel car park the second accused directed him to park at level P4 where there were parking lots available.

[13] After the appellant had parked the car, he switched off the engine and they both got out of the car. The second accused asked the appellant to keep in the car bonnet a bag bearing the name 'ELVI' that he had with him. The appellant then locked the car and kept the car key in his trouser pocket. The second accused walked towards the lift followed by the appellant. The appellant was smoking at the lift area and was looking around when he saw a male armed with a pistol who, in a loud voice, identified himself as the police. Both the second accused and himself were then handcuffed. He was then asked where his car was and he told the police the location. The police asked him where the car key was and he told them that it was in his pocket. The policeman took the key from his pocket. The car was opened and the bags were found inside the car. The appellant was then taken to the police station. There he saw the second accused and the third accused.

[14] Thus to summarise, it was the defence case that the appellant was merely driving his employer, the second accused and it was the second accused who had directed him to go first to Cheras and then to the hotel where the second accused wanted to meet Ah Kim. He did not know the third accused and he did not know how many bags were put into his car. He was told by the second accused that the bags contained clothes as gifts for Ah Kim. He was surprised when the police approached him. According to the appellant the policeman was armed with a pistol. He denied that he was arrested inside the car. He said that both the second accused and him were arrested at the lift area and the policeman had taken the car key from his pocket. The appellant denied knowledge of the drugs in the bags. He denied that there was a bag placed on the handbrake of the car. He denied that he and the second accused were at the hotel to deliver dangerous drugs. He denied that he was frightened when he was arrested. He denied that his defence was an afterthought.

DECISION OF THE HIGH COURT

[15] The learned judge accepted the evidence of the prosecution witnesses. His Lordship dismissed the defence as a bare denial ('penafian semata-mata'). We reproduce the relevant parts of the learned judge's grounds of judgment as follows:

> Tertuduh menafikan sebuah beg berwarna hijau berada di atas handbrake kereta yang dipandunya. Tertuduh cuba menafikan secara penafian semata-mata bahawa beliau tidak melihat langsung beg yang diletakkan di belakang keretanya. Tertuduh juga menafikan ditangkap di luar kereta tetapi semasa berada di tepi lif. Tertuduh cuba memberi alasan beliau kelihatan ketakutan dengan alasan bahawa pihak polis mengacu pistol ke arah beliau semasa hendak menangkapnya. Pihak pendakwaan menyatakan bahawa tiada pistol digunakan dan tertuduh kelihatan takut sebab mengetahui dadah yang berada di dalam kereta.

Mahkamah ini menilai pembelaan tertuduh dan berpuas hati dari keseluruhan kes yang ada diputuskan bahawa tertuduh gagal menimbulkan keraguan yang munasabah melalui pembelaannya.

Mahkamah ini memutuskan mempercayai keterangan saksi-saksi pendakwaan terutama pegawai-pegawai polis semasa menyerbu kereta tertuduh yang dipandu dan barang kes beg hijau berada di atas handbrake dan mengetahui isi di dalamnya adalah dadah dan paling tidaknya hanya perlu membuka zip beg dan melihat apa di dalamnya.

Mahkamah ini semasa di akhir kes pendakwaan alasan melepas dan membebaskan ketiga-tiga tertuduh hanya atas alasan keterangan Ahli Kimia SP10 yang gagal menyatakan berat dadah yang di perolehi selepas di analisa. Selain daripada itu Mahkamah ini berpuas hati keterangan di dalam kes pendakwaan berjaya membuktikan akan pengetahuan, kawalan dan jagaan iaitu pemilikan.

Oleh kerana dadah yang begitu banyak dari jenis heroin, maka anggapan di bawah s 37(da) adalah jelas gagal disangkal oleh tertuduh.

THE APPEAL

[16] Before us, learned counsel for the appellant Encik Afifuddin Ahmad Hafifi raised three issues which can be summarised as follows:

(a) that the learned judge had erred in drawing an inference of knowledge;

(b) that the learned judge had failed to evaluate whether, on the evidence, common intention had been proved; and

(c) that there was doubt on the identity of the exhibits.

However, in the course of his submissions, learned counsel had abandoned the third issue.

KNOWLEDGE

[17] Learned counsel submitted that His Lordship had failed to consider whether there was sufficient evidence upon which the learned judge could make an inference of knowledge. Referring to the grounds of judgment it was submitted that the learned judge had inferred knowledge against the appellant based on his conduct and proximity to the drugs.

[18] On the issue of conduct, learned counsel submitted that the learned judge had erred in stating that the appellant looked frightened at the time of arrest. Learned counsel referred to the evidence of SP5 who testified that the driver and the passenger looked surprised (p 158 of the appeal record). In cross-examination the appellant himself had denied that he was frightened (p 31 of the appeal record). It was further submitted that the appellant had testified that the policeman who approached him was armed with a pistol. SP5 himself had, in cross-examination, admitted that he had drawn his pistol (p

185 of the appeal record). Therefore the learned judge had erred in his evaluation of the evidence of SP5 and in rejecting the appellant's evidence that firearm was used during the arrest. It was submitted that the error made by the learned judge in evaluating the evidence of SP5 regarding the appellant's conduct had led the learned judge to make an erroneous inference of knowledge against the appellant. Considering the circumstances, learned counsel submitted that it was reasonable for the appellant to look surprised when he was suddenly approached by a man armed with a pistol. It was further submitted that conduct alone in the absence of any other overt act by the appellant could not be equated with a guilty mind (*Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1). In the present case there was no evidence of any overt act on the appellant's part.

[19] For the respondent, the learned deputy public prosecutor ('DPP') Tetralina Ahmed Fauzi submitted that the learned judge had considered the appellant's explanation and had rejected it as an afterthought. The appellant was driving the car in which the drugs were found and it was incumbent upon him to give a reasonable explanation. Relying on the authority of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337 learned DPP submitted that on the evidence the learned judge was correct in finding that the appellant had custody and control and knowledge of the drugs.

[20] We had perused the facts in the case of *Abdul Rahman bin Akif* and we find that, on the facts, that case is distinguishable. Unlike the present appeal where the appellant was arrested together with the second accused, in that case the respondent was alone at the time of arrest. Therefore there was no issue of common intention. Further, the respondent in that case was found to have had custody and control of the car for seven months prior to his arrest. Five blocks of compressed plant material confirmed to be cannabis were found in the car. Since the respondent had custody and control of the car for seven months, the court found that he could not have been oblivious to the large amount of cannabis inserted under the passenger and driver's seats. Therefore the court held that he must have had custody and control and knowledge of the drugs. In the present appeal the prosecution evidence showed that the three bags were put inside the appellant's car by the third accused on the night of the incident and shortly before the arrest. Thus on the factual matrix, we find that the case of *Abdul Rahman bin Akif* is of no assistance to the respondent herein.

[21] The appellant and the second and third accused were charged with having the common intention to traffic in dangerous drugs. Thus not only must the prosecution prove the factum of physical possession but also that they had knowledge as to the nature of the drugs because knowledge is an essential ingredient of possession. In order for possession through having custody and control to incriminate a person, it must be such that the possessor must know

A the nature of the things possessed (*Public Prosecutor v Basri bin Salihin* [1994] 2 MLJ 476; [1993] 1 CLJ 420).

[22] Reverting to the issue of the appellant's conduct, we agreed with learned counsel that the learned judge had erred in evaluating the evidence of SP5 and B in disbelieving the appellant's evidence when it was obvious that the evidence of SP5, who had admitted drawing his firearm at the time he effected arrest on both the appellant and the second accused, supported the appellant's evidence. We agreed with learned counsel that the appellant's look of surprise was a C reasonable reaction in the circumstances.

[23] Both the appellant and the second accused did not resist arrest. There was no evidence of any overt act on their part other than 'terkejut'. In fact their conduct could only benefit the appellant's case as it negatived any inference of D knowledge of the drugs from either the appellant or the second accused, particularly the appellant. With no evidence of fear adduced, let alone there was no attempt to escape or a struggle put up against the police, the prosecution had failed to establish any evidence upon which an inference of knowledge about the drugs in the car can be made. Without knowledge, the prosecution E had failed to establish the ingredient of possession (*Public Prosecutor v Salleh bin Zakaria & Anor* [2010] 4 MLJ 25; [2010] 4 CLJ 671). Further there was insufficient evidence to show that the appellant had possession of the dangerous drugs in question together with the other two accused persons, or with either one of them (*Public Prosecutor v Mohd Bandar Shah bin Nordin & Anor* [2008] 4 MLJ 556; [2008] 4 CLJ 859). F

[24] On the issue of proximity to the drugs, we agreed with learned counsel that physical proximity to the drugs perse is insufficient to prove possession without proof of knowledge. Except for the evidence of proximity, there was G nothing in the conduct of either the appellant or the second accused at the time of their arrest upon which a prima facie inference could be made that the appellant or both of them had knowledge of the drugs. At the highest, the evidence merely showed that perhaps the appellant had some momentary custody of the bags together with the second accused. In such circumstances H there was no possession (per Lord Morris in *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356).

[25] We find that the error made by the learned judge in evaluating the prosecution evidence rendered his basis for making the inference of knowledge I based on the appellant's conduct unsupportable. A trier of fact who makes finding based purely upon the demeanour of a witness without undertaking a critical analysis of that witness's evidence runs the risk of having his findings corrected on appeal. (*Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 (CA)).

COMMON INTENTION

[26] Learned counsel submitted that the trial judge had erred in not considering that the evidence did not show any link or nexus between the appellant and the third accused or that the appellant had any common intention with either the second or third accused or with both of them to commit the offence. It was submitted that in fact the learned judge had not considered the issue of common intention in his judgment. We had perused the grounds of judgment and we find that indeed nowhere in his judgment did the learned trial judge address his mind to this material issue. This was, in our view, a serious non-direction amounting to a misdirection. However for the purpose of completeness, we will address this issue.

[27] Section 34 of the Penal Code reads as follows:

> 34 When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

A common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. (*Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37; [2005] 1 CLJ 466; [2004] 1 LNS 654). In the case of *Khoo Hi Chiang v Public Prosecutor And Another Appeal* [1994] 1 MLJ 265; [1994] 2 CLJ 151 the Supreme Court referred to the Indian Privy Council case of *Mahbub Shah v King Emperor* [1945] LR 72 lA 148 as follows:

> To invoke the aid of s 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan; and to convict the accused of an offence applying the section, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

In *Wan Yurillhami bin Wan Yaacob & Anor v Public Prosecutor* [2010] 1 MLJ 749; [2010] 1 CLJ 17; [2009] 1 LNS 1125, the Federal Court said:

> It is a well established principle of law in dealing with the criminal liability under s 34 of the Penal Code that a pre-concert or pre-planning may develop on the spot or during the course of the commission of the offence, but the crucial test is that such plan must precede the act constituting the offence.

[28] We had considered the evidence adduced by the prosecution and we find insufficient evidence to show any pre-planning between the appellant and the second and the third accused or with either of them. As submitted by learned counsel and with whom we agreed, there was also no evidence to link the appellant to the third accused. Therefore, on the evidence the prosecution had failed to prove common intention.

CONCLUSION

[29] A presiding judge must undertake a maximum evaluation exercise at the end of the prosecution case and again at the defence stage.(*Romi Amora bin Amir v Public Prosecutor* [2011] 4 MLJ 571; [2011] 1 CLJ 870). Where the law casts the onus of giving an explanation upon an accused person, and the explanation is given, the court is duty bound to consider whether it might reasonably be true, although not convinced of its truth. However weak a defence may be, trial judges being judges of both fact and law should not just brush aside the defence on the basis that the prosecution witnesses are to be believed and not the defence witnesses (see *Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577; [1998] 2 CLJ 1 (FC)).

[30] In the present appeal, the learned judge had not only failed to give reasons for rejecting the defence case but His Lordship had also failed to direct his mind to the issue of common intention. This was a serious misdirection by way of non-direction. We were of the view that the defence case was not inherently improbable. The defence had succeeded in raising a reasonable doubt in the prosecution case on a balance of probability thereby rebutting the presumption under s 37(da) of the Act.

[31] For the reasons aforesaid, we find that it was not safe to maintain the conviction. Consequently we allowed the appeal and set aside the conviction and sentence. The appellant was acquitted and discharged.

Appeal allowed, conviction and sentence set aside and Low acquitted and discharged.

Reported by Ashok Kumar